INTERIOR BOARD OF INDIAN APPEALS

Great Western Casinos, Inc. v. Acting Pacific Regional Director,
Bureau of Indian Affairs

36 IBIA 115 (04/09/2001)

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VA 22203

GREAT WESTERN CASINOS, INC., Appellant	:	Order Affirming Decision
v.	:	
	:	Docket No. IBIA 00-77-A
ACTING PACIFIC REGIONAL DIRECTOR, BUREAU OF INDIAN AFFAIRS, Appellee	:	April 9, 2001

Appellant Great Western Casinos, Inc., seeks review of a March 23, 2000, decision of the Acting Pacific Regional Director, Bureau of Indian Affairs (Regional Director; BIA), 1/ cancelling Business Lease No. 5002079303 between Appellant and Helen A. St. Marie Black (Black). For the reasons discussed below, the Board of Indian Appeals (Board) affirms that decision.

On March 5, 2001, the Board received a motion for expedited consideration from Black, who stated that she "is 91 years old and in ill health." Motion at 1. Expedited consideration is granted.

Background

The property at issue in this appeal is located within the Morongo Indian Reservation and is owned by the United States in trust for Black. It is described as all of Parcel No. 92 (5.13 acres) and the southern portion of Parcel No. 91 (3.20 acres), W½ SW¼, sec. 6, T. 3 S., R. 2 E., San Bernardino Base and Meridian, Riverside County, California. The property is located about 1/4 mile from Interstate Highway 10, with easy access via the Fields Road interchange. It is improved with a large paved parking lot and a wood and stucco building which has approximately 29,616 square feet of floor space.

1/ During some time periods relevant to this appeal, the Pacific Regional Director had the title Sacramento Area Director. For ease of reference, the Board uses the title Regional Director throughout this opinion.

The building was originally constructed and used as the Morongo Bingo Parlor. The bingo parlor was closed in 1984 or 1985, when a new tribal gaming facility was constructed several miles away. Neither the property nor the building has been occupied since the bingo parlor closed. Apparently, the building is now being used as a shelter by transients.

Sometime in 1992, Black entered into negotiations with Appellant concerning the building. 2/ An Environmental Assessment (EA) for leasing the property to Appellant was completed on December 16, 1992. Although the EA stated that the lead agency was BIA, nothing in the administrative record shows that BIA was aware of any proposals concerning use of the property at that time.

On April 17, 1993, counsel for Black submitted a proposed lease to BIA for review. Although no copy of the proposed lease is attached to the copy of counsel's letter in the administrative record, there is a copy as an addendum to a May 1993 appraisal of the property. The proposed lease includes an "Option to Purchase" the property for $1,500,000, with credit for rental payments made. The appraisal therefore treated the proposed lease as one with an option to purchase.

Subsequent to all BIA reviews, Lease No. 5002079303 was executed by Appellant and Black. Although the copy of the lease in the administrative record is not dated, no one has disputed that the lease was properly executed. The lease was approved by the Superintendent, Southern California Agency, BIA (Superintendent), on August 5, 1993.

The lease was for retail, office, restaurant, and general commercial uses and had a term of 10 years. Rent was payable in monthly installments, by the first of each month. Addendum No. 3 to the lease sets out the rental amounts by year. Those amounts increased each year, from an initial amount of $5,800 to a final amount of $8,255.21. Although the Addendum does not so state, it appears from other documents that the amounts set out in Addendum No. 3 were the monthly rental payments for each year of the lease. The lease as approved does not contain an option to purchase.

A September 22, 1998, lease compliance report states that Appellant was in default on "All terms" of the lease, but especially in non-payment of rent and failure to obtain required insurance. On October 16, 1998, the Agency Realty Officer wrote to Appellant stating that rent in the total amount of $43,454.24 was due and owing to Black; that the property was not being

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2/ These negotiations were with E.C. Investments USA, Inc. According to a Dec. 1, 1993, letter to the Riverside Agency, BIA, E.C. Investments USA, Inc., changed its name to Great Western Casinos, Inc., effective Nov. 15, 1993. Although at the time, BIA was merely informed of a change in corporate name, it appears from other materials in the file that there may also have been a management change.

used for any purpose; and that insurance coverage had not been obtained. The letter informed Appellant that it had 60 days to come into compliance with the terms of the lease and that, if the defaults were not corrected within the 60-day period, Appellant would be given 10 days in which to show cause why the lease should not be cancelled.

The October 16, 1998, letter was returned to BIA as undeliverable. The Realty Officer requested assistance from the California Secretary of State in effecting service on Appellant. The letter with a new date of November 12, 1998, was resent to Appellant in accordance with the information provided by the California Secretary of State.

Appellant responded on January 15, 1999. Appellant stated that its "current management, which came into control of the company in 1996, does not have a complete file of this matter." Appellant asked BIA to provide it with copies of documents relating to the lease.

BIA provided information to Appellant on January 25, 1999. Appellant replied on February 4, 1999, stating:

> The existence of a lease appears somewhat confusing. To the best of our information, prior to the lease agreement, the parties had entered into an agreement under which [Appellant] agreed to purchase the property from Helen Black. [Appellant] paid many hundreds of thousands of dollars to Mrs. Black pursuant thereto. A lease agreement under these circumstances would appear to have dubious validity. Furthermore, it appears that there are other agreements which might supersede the lease.
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> [Appellant's] involvement with the property in question goes back to the first quarter of 1992 and appears to be considerably more complex than a simple landlord-tenant relationship.

After further communications, the Superintendent wrote to counsel for Appellant on February 19, 1999. The letter stated:

> [Y]ou stated that [Appellant] has paid the landowner for purchase of this property. There is no record on file in this office that indicates the landowner's interest in selling this property to you. As this property is held in trust by the United States for Helen Black, no encumbrance or alienation may be made without the consent of the Secretary [of the Interior], or his designated agent. Therefore, we have no basis for acceptance of [Appellant's] claim. In order for this office to make a determination, please provide all the documentation you, or [Appellant], has that would indicate Mrs. Black's agreement to selling this property. Even though [Appellant] claims to have made direct lease payments to Ms. Black, in accordance with 25 U.S.C. § 202 (1983) and regulations found at 25 C.F.R.

> § 152.22 (1998), inducing an Indian to execute an instrument purporting to convey any trust land or interest therein, or the offering of any such instrument for record, is prohibited and criminal penalties may be incurred.

BIA stayed lease cancellation pending receipt and review of additional information which it requested from Appellant.

By letter dated March 9, 1999, Appellant provided BIA with copies of eight cancelled checks, dated between June 20, 1993, and December 8, 1993, inclusive. Although the copies of these checks in the administrative record are almost illegible, it is possible to read that several were made payable to Helen Black or Helen St. Marie Black. Four of the checks show endorsements by Helen Black or Helen St. Marie Black. Two of the checks show comments in the "memo" section which are mostly illegible, but end with "by BIA." According to information provided by Appellant on the top of each photocopy of a check, the checks totalled $250,000. 3/ Appellant stated in its letter: "It is clear that, if there is any validity to the lease from Ms. Black, [Appellant] has made payments far in excess of any rental obligations under the lease. If the payments were for the purchase of the property, and if the purchase [was] not legal as you suggest, perhaps Ms. Black has perpetrated a fraud and should return the money."

On June 17, 1999, BIA wrote to Appellant's new attorney, after being informed by its prior attorney that Appellant's management had again changed and he had been prohibited from releasing any information to BIA. In its letter, BIA stated that, because Appellant had not provided the information which BIA had requested, lease cancellation proceedings were being resumed. The letter gave Appellant 10 days in which either to come into compliance with the lease terms, or to show cause why the lease should not be cancelled.

Counsel for Appellant responded on June 25, 1999. After stating that he had not been able to contact Appellant's principal, counsel noted that BIA's June 17, 1999, letter did not address the payments made to Black.

On June 29, 1999, the Superintendent cancelled the lease and notified Appellant of its right to appeal to the Regional Director.

By letter also dated June 29, 1999, counsel for Appellant wrote BIA, stating:

> Enclosed for your consideration is an Agreement Re: Purchase/Sale of Real Estate prepared in connection with the subject property. This document reflects an "advance payment" of **$850,000**, approximately, towards the purchase and sale of the building. The document also acknowledges the approval

3/ Appellant's letter incorrectly stated that the total amount was "$250,000,000."

> procedure through the BIA. As trustee acting in behalf of Ms. Black, I am confident that your office is concerned with evidence of such payments to her, and will stress to her the very likely repercussions to her - and other individuals and entities involved - should [Appellant] be forced to file suit in order to recover these funds. I can assure you that [Appellant] will pursue such litigation.

Appellant then demanded that the matter be submitted to arbitration under Article 36 of the lease. 4/

The purchase/sale agreement enclosed with Appellant's June 29, 1999, letter was signed by Appellant on November 8, 1994. It was not signed by Black. Neither is there any indication that it was approved by BIA, although section 2 required Black to submit the agreement to BIA "upon execution and approval of the Agreement by Buyer and Seller." The agreement recited a total sale price for the property of $1,425,000, and indicated that advance payments had already been made in the approximate amount of $850,000. The agreement further required monthly payments of $12,500 to be made to Black by Appellant, beginning upon submission of the agreement to BIA and continuing until final payment or close of escrow.

The Superintendent responded to Appellant's June 29, 1999, letter on July 1, 1999. He stated:

> First, under the March 9, 1999, letter prepared by [Appellant's previous attorney], we received what [Appellant] purports to be evidence of a sales conveyance between [Appellant] and Ms. Black. This evidence, which is largely illegible photocopies, is in the form of checks paid to and endorsed by Ms. Black.
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> Second, under your June 29, 1999, correspondence we received a copy of an "AGREEMENT RE PURCHASE/SALE OF REAL ESTATE," which was not signed or dated by Ms. Black. This is the first time we have seen this agreement. We have no record of a proposed or approved sale transaction between [Appellant] and Ms. Black.
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> Third, based on the official record, we have before us an approved business lease in default, not an Indian trust land sales conveyance. The record further indicates that agency staff has attempted to work with [Appellant] for over six months to resolve this matter, without success. In accordance with the Bureau's trust responsibility, we will entertain no further delays.

4/ Article 36 of the lease provides for arbitration "[w]henever the terms of this lease require that a dispute be settled by arbitration." The Article continues: "Nothing herein is intended to, and shall not, require arbitration of any dispute relating to a material breach of any term of this lease."

The letter then cancelled the lease effective July 1, 1999, and notified Appellant of its right to appeal to the Regional Director.

By letter dated July 6, 1999, Appellant again asked about arbitration. On July 8, 1999, the Superintendent declined to submit the matter to arbitration, stating that the arbitration clause of the lease did not apply to any dispute relating of a material breach of any term of the lease, and did not apply unless both the lessor and the lessee requested arbitration. The Superintendent stated that the issuance of his July 8, 1999, letter did not affect the cancellation of the lease or alter Appellant's appeal rights.

Appellant appealed to the Regional Director. During the pendency of this matter before the Regional Director, Appellant submitted copies of its general ledger which indicated that it had made four payments to Black, each in the amount of $25,000, on January 7, February 8, March 8, and April 8, 1994. It also submitted a copy of a July 14, 1994, letter to Black from Appellant setting forth the essence of the purchase terms incorporated into the purchase/sale agreement which it had earlier submitted. This letter was apparently signed by Black on July 14, 1999. The transmittal letter stated that Appellant understood there was grand jury testimony in which Black confirmed the purchase agreement and that it was attempting to obtain a copy of that testimony. There is no indication in the record that Appellant ever submitted such testimony.

Black filed a brief before the Regional Director. She argued that lease cancellation was appropriate and that no purchase agreement had been submitted to BIA for approval.

On March 23, 2000, the Regional Director issued the decision on appeal. The decision states:

> [T]he lease between Helen Black and [Appellant] was approved by the Superintendent on August 5, 1993. Accordingly, rental payments should have commenced after the lease approval date. The Appellant has not provided evidence of payment of monthly rents to Helen Black, but has taken the position that rents were not due because Appellant had an agreement with Mrs. Black for the purchase of the leased premises. In support of this claim, Appellant submitted a copy of an "Agreement Re Purchase/Sale of Real Estate" that was executed by [Appellant] on November 8, **1994**. The copy of the agreement provided does not reflect signature of Helen A. St. Marie Black, and the record reflects that the purchase agreement was not submitted to the Superintendent for BIA approval.
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> Appellant did submit a copy of a July 14, 1994 letter addressed to Helen Black that sets forth "final purchase terms" for the real property * * *. Helen Black, evidencing her agreement and acceptance of the purchase terms, apparently

signed this letter. However, this July 14, 1994 letter again speaks to actions to be taken **after** BIA approval of a purchase agreement.

Appellant submitted illegible copies of checks claiming that they reflect payments to Helen Black for the purchase of her property rather than as payments for rental due. However, the "Agreement Re Purchase/Sale of Real Estate" that Appellant claims was entered into by Helen Black and [Appellant] was not even signed on behalf of Appellant until November 8, **1994**. Appellant has not provided evidence that Helen Black ever signed such purchase agreement for her trust property. For this reason, we **cannot** conclude that the checks totalling $250,000.00, all issued during **1993**, represent payment for real estate as is claimed by Appellant. Even if Helen Black had signed such an agreement, it is null and void absent Secretarial approval (25 CFR 152.22).

The purchase agreement itself specifies that it shall be submitted by Seller to the BIA for approval. However, the record does not indicate that the Appellant made any status inquiry of the BIA Superintendent as to approval or disapproval of the purchase agreement. The record reflects that BIA did not receive a copy of said purchase agreement until it was submitted under cover of Appellant's June 29, 1999 letter in connection with the subject lease defaults. Had the agreement been submitted to BIA, other actions would have been taken pursuant to 25 CFR 152.17, et seq.

Even if considering that Appellant believed that it had been making payments to Helen Black under the subject purchase agreement, Appellant has not submitted evidence that the full purchase price of $1,425,000.00 was paid. Under 25 CFR 152.35, it specifies as follows: "If a purchaser on any deferred payment plan makes default in the first or subsequent payments, all payments, including interest, previously made, will be forfeited to the Indian landowner."

Appellant also claims that BIA cannot cancel the subject lease for nonpayment of rents in that Appellant was not required to provide BIA with proof of payment. Mrs. Black apparently asserted in 1998 that she did not receive rentals under the subject lease, and in her Answer of Interested Party to Appellant's Statement of Reasons, she continues to assert she did not receive rentals under the lease. The burden to prove that rentals were paid falls upon the Lessee, not the Indian Lessor or the BIA Superintendent. Cancellation of the lease for nonpayment of rents is only one of several defaults cited by the Superintendent. The other cited defaults are failure to use the premises for the purposes set forth in the lease contract and for failure to provide evidence of public safety liability and other insurance coverage required under Articles 9 and 10. These defaults in

themselves are grounds for lease cancellation, and Appellant has made no effort to cure them.

Mar. 23, 2000, Letter at 3-5.

Appellant then filed the present appeal with the Board. Appellant and Black filed briefs on appeal.

Discussion and Conclusions

The decision on appeal here concerns the cancellation of Appellant's lease. Appellant does not address that decision directly. Instead it argues, in essence, that BIA has an obligation to police Black's purported agreement to sell the property to Appellant and to investigate Black's receipt of funds from Appellant.

Appellant's theory seems to be that BIA has an obligation to protect Appellant from Black, the trust beneficiary. BIA has no such obligation. E.g., Burrell v. Acting Albuquerque Area Director, 35 IBIA 56 (2000) (Where a lease of trust land is concerned, BIA's duty is toward the Indian lessor, not the lessee); Aghjayan v. Acting Portland Area Director, 29 IBIA 128 (1996) (BIA has no obligation to protect a lessee from his own negligence); Gullickson v. Aberdeen Area Director, 24 IBIA 247 (1993) (Where a sale of trust land is concerned, BIA's duty is toward the Indian seller, not the prospective purchaser).

Although it is not at all clear, it appears that Appellant may be arguing that it properly purchased the leased property from Black. Appellant does not contend that BIA approved a sale or even that BIA was requested to approve a sale.

No sale of trust land is valid without the approval of the Secretary of the Interior or her delegate. See, e.g., 25 C.F.R. §§ 152.17 (and statutes listed there) and 152.22. While the materials before the Board show that both Appellant and Black may have contemplated a sale of the property, those materials do not show that a sale was approved by BIA. Based on the evidence before it, the Board concludes that there has been no valid sale of the property to Appellant. 5/

5/ Appellant cites, among other things, 25 C.F.R. § 152.35, "Deferred payment sales," thus suggesting that the payments it alleges it made to Black were intended to be payments under a deferred payment sales contract. Deferred payment sales, like any other sales of trust land, must be approved by BIA in order to be valid. Further, under section 152.35, if the purchaser fails to pay the full purchase price, all payments are forfeited to the seller, who also retains the property. Stuart v. Acting Billings Area Director, 25 IBIA 282 (1994); aff'd, No. CV-94-43-GF-PGH (D. Mont. July 24, 1995); aff'd, Stuart v. Bureau of Indian Affairs, No. 95-35978 (9th Cir. Mar. 14, 1997).

The only real question here is whether the lease was properly cancelled. Appellant does not dispute the Regional Director's finding that it did not use the leased premises for the purpose intended and did not obtain public liability insurance or fire and damage insurance on the property as required by Clauses 9 and 10 of the lease, respectively. These defaults standing alone are sufficient to support cancellation of the lease.

Although the Board need not address Appellant's arguments in regard to rental payments because of its conclusion that the two breaches mentioned above were sufficient to support lease cancellation, it believes some comment is necessary under the circumstances of this case.

Appellant attempts to put the burden on Black or BIA to prove that Black did not receive rental payments. It contends that BIA should have interrogated Black as to her receipt of funds from Appellant. The Board does not agree with Appellant that Black and/or BIA have the burden of proof here. Appellant was required under its lease to make rental payments. If payment is challenged, Appellant bears the burden of proving that it made all required payments.

Of the eight cancelled checks made out to and allegedly endorsed by Black in 1993, 6/ totalling $250,000, $50,000 was paid before the execution of the lease; $100,000, divided into two checks, was paid the day after the lease was approved by BIA; and the remaining four checks, each for $25,000, were dated September 24, October 10, November 9, and December 8, 1993. Neither the dates nor the amounts of the checks relate to the rental requirements under the lease. The additional four entries in Appellant's general ledger show payments of $25,000 each to Black on January 7, February 8, March 8, and April 12, 1994. Again, these payments do not correspond with the amount of rental payments due or with the due dates for those payments.

Based on Appellant's submissions, the Board finds that it has not shown even one rental payment to Black.

Appellant's major argument is that it has paid Black amounts far in excess of the rentals due under the lease. While the Board does not accept Appellant's premise that payments made for a purpose other than rent can, in essence, be offset againt the rental amounts due under the lease, it nevertheless examines the payments indicated in the administrative record and Appellant's supplemental filings.

Appellant alleges that it has paid Black over $850,000. However, it has not provided evidence of payments to her in anything near that amount. Appellant's cancelled checks totalled $250,000. In addition, Appellant has provided copies of its general ledger showing four disbursements to Helen Black in the additional total amount of $100,000. These ledger entries are not supported by any other evidence of payment. Even if the Board were to give Appellant the

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6/ In the context of this proceeding, Black has neither admitted nor denied endorsing these checks. She was not required to do so.

benefit of every doubt as to payments made to Black, Appellant has still shown only a maximum payment of $350,000. According to the Board's calculations, the total amount of rent due through the end of the lease term, assuming there was no interest due on any late payments, is $835,625.04. Thus, Appellant has failed to show that it has made payments to Black in excess of the rentals due under the lease.

The Board concludes that this lease was properly cancelled on the additional ground of failure to pay the rental required under the lease.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Pacific Regional Director's March 23, 2000, decision to cancel Business Lease No. 5002079303 is affirmed. This decision is final for the Department of the Interior.

//original signed
Kathryn A. Lynn
Chief Administrative Judge

//original signed
Anita Vogt
Administrative Judge